



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	Filed December 30, 1981
CLAY MORGAN SPEARS,	)	
Defendant-Appellant.	)	$\frac{1-355}{65325}$

Appeal from Scott District Court, James R. Havercamp, Judge.

Defendant appeals from his conviction of attempted murder in violation of section 707.11, The Code 1979. AFFIRMED.

Patrick Kelly, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant appeals from his conviction of attempted murder in violation of section 707.11, The Code 1979. We affirm the defendant's conviction.

Defendant, Clay Morgan Spears, was jointly charged with his brother by a county attorney's trial information with the crime of attempted murder in violation of section 707.11, The Code 1979. The charges arose from a barroom altercation that resulted in the stabbing of Jerry Miles, a patron of the tavern. The defendants went to trial, and a jury found both defendants guilty as charged.

Defendant contends he was denied a fair trial by virtue of prosecutorial misconduct. Defendant assigns prejudice to a statement made by the prosecutor in closing argument to the jury.

We note at the outset, no record was made of the prosecutor's closing argument, and, therefore, we do not have the precise words uttered by the prosecutor contained in the record. Given that, we assume, without deciding, defense counsel properly preserved error and made a sufficient record to permit a review of the substantive merits of this appeal. We assume defense counsel's in-chamber discussion with the trial judge would have substantially complied with the pre-1978 code procedure for creating a record via a bill of exception signed by the judge. See §§ 786.5, .6, The Code 1977. See also State v. La Mar, 260 Iowa 957, 966, 151 N.W.2d 496, 501 (Iowa 1967). We need not decide that question, however, due to the fact we hold the trial court did not abuse its discretion in overruling defendant's objection.

We review the trial court's ruling on the defendant's objection to the statements of the prosecutor to determine if the court abused its discretion. State v. Vickroy, 205 N.W.2d 748, 750 (Iowa 1973). In Vickroy, the supreme court stated: "That discretion is not, however, without limitations. It must be utilized fairly and impartially, not arbitrarily, by application of relevant, legal and equitable principles to all known or readily available facts of a given issue or cause to the end that justice may more nearly be effectuated." Id. at 750. In commenting on abuse of discretion, the court in State v. Noonan, 246 N.W.2d 236 (Iowa 1976), stated there is no abuse unless "the results [are] so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the

exercise of will but rather passion or bias." Id. at 257.

We fail to see how the court abused its discretion in ruling that the prosecutor's remarks were not so prejudicial as to deny defendant a fair trial. See State v. Lyons, 210 N.W.2d 543, 548 (Iowa 1973). The record of the in-chambers discussion establishes the fact the trial court considered, and rejected, defense counsel's argument of prejudice. Cf. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979)(which held the failure to exercise discretion is an abuse of discretion.) Defendant claims the prosecutor's statement to the effect "Clay Spears stood in the shoes of Mark Spears" was inconsistent with Instruction 10. Defendant based his defense in part on justification. Instruction 10 framed in the singular tense directs the jury to judge defendant by his own actions. Defendant did not object to the instruction given by the court. Failure to object to an instruction constitutes a waiver of any error. See State v. Herndon, 257 N.W.2d 19, 22 (Iowa 1977). Notwithstanding the failure to object, on the merits we find the prosecutor's statement was not inconsistent with Instruction 10 and the other instructions taken as a whole. The prosecutor's statement does not violate the instructions. Cf. State v. Wilson, 235 Iowa 538, 17 N.W.2d 138, 142 (Iowa 1945)(which states "where the actual perpetrator of the crime acts in self-defense one who aids and abets him is not criminally responsible.") We cannot find manifest abuse of discretion in the trial court's ruling that the prosecutor's statement was consistent with Instruction 10. Nor can we find any prejudice to defendant attributable to the court's ruling. We conclude the statement of the prosecutor did not deprive defendant of a fair and impartial trial.

AFFIRMED.